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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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VICKIE BURTON et al.,

Plaintiffs and Appellants,

v.

PSYCHIATRIC SOLUTIONS, INC. et al.,

Defendants and Respondents.

C067923

(Super. Ct. No.  
34200900034345CUMMGDS)

Steven Burton (Burton) voluntarily admitted himself to Sierra Vista Hospital for treatment for alcoholism and depression; he died the next morning from polysubstance intoxication. His wife Vickie Burton and his adult daughter Erin Bradshaw (plaintiffs) brought suit against the hospital and its parent corporation Psychiatric Solutions, Inc. (defendants)

for medical negligence and wrongful death.<sup>1</sup> The trial court granted defendants' motion for summary judgment.

On appeal, plaintiffs contend it was error to grant summary judgment because defendants failed to negate allegations that certain physicians were agents of the hospital and there was no evidence that the physicians did not breach the standard of care. Further, plaintiffs contend triable issues of material fact remain as to whether the hospital's staff breached the standard of care. We reject these contentions and affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### *Burton's Stay at Sierra Vista Hospital*

Accompanied by his wife, Burton presented at Sierra Vista Hospital the afternoon of February 16, 2008, for a voluntary psychiatric evaluation. He stated he felt depressed, hopeless, and helpless. He had a family history of alcoholism and self-medicated for pain with alcohol. He drank a bottle of wine each day and had done so for the last four years. He was admitted for an alcohol detoxification protocol.

Burton was admitted by Okechukwu Nwangburuka, M.D. Nwangburuka ordered certain detoxification medicine, including Ativan, which was given upon admission. The doctor also ordered staff to call the attending or on-call physician if Burton had a severe alcohol withdrawal syndrome score (AWS), or his vital signs or withdrawal symptoms did not respond to the regimen.

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<sup>1</sup> A second adult daughter, Carrie Thomas, was originally a plaintiff, but she was dismissed from the suit with prejudice.

An initial assessment was performed by Pearl Ngo, R.N. Burton told her that he used a continuous positive airway pressure (CPAP) device every night while sleeping. Ngo told Burton the hospital did not have CPAP devices. Burton replied that his wife had already left, but he would call her to bring the CPAP machine the next day.

After 9:00 p.m., Burton was examined by Martin Ramirez, M.D. Ramirez's notes do not indicate that Burton had sleep apnea or used a CPAP machine. Ramirez ordered several of Burton's pre-admission medications to begin the next morning at 8:00 a.m.

Burton retired after 10:00 p.m. Hospital staff checked on him every 15 minutes. At 2:00 a.m. the next morning, Burton was resting comfortably. At 4:25 a.m., Burton was found on the floor. He claimed he did not fall, but because his legs felt like jello, he was crawling. Burton was returned to bed. His AWS was 14, which is moderately high. He was given another 2 mg. of Ativan. By 4:55 a.m., his AWS was 10. By 5:00 a.m., Burton was feeling better. He was given more medication for alcohol withdrawal. Shortly thereafter, his AWS was 6; it fell to 4 by 5:45 a.m. Nursing notes indicate that Fayez Romman, M.D. was paged twice during this period, but did not respond. At 6:35 a.m., Burton was sleeping with no sign of distress. A few minutes later, Burton got up to use the urinal.

About 7:00 a.m., Burton was found in bed, not breathing and nonresponsive. A Code Blue was activated, CPR initiated, and

911 called. Burton was transferred to the Kaiser Emergency Department. He was pronounced dead at 7:36 a.m.

An autopsy report stated the cause of death as polysubstance intoxication. Levels of two prescription medications, amlodipine (Norvasc) and duloxetine (Cymbalta), were "notably elevated." Both medications are metabolized by the liver. Burton had moderate to severe steatosis of the liver. According to the autopsy report, it appeared his "liver impairment prevented his body from properly flushing medications from his system which caused the medications to build up to a lethal level." His death was classified as natural.

#### *The Lawsuit*

Plaintiffs brought suit against Sierra Vista Hospital, Psychiatric Solutions, Inc. and Drs. Ramirez and Romman for medical negligence and wrongful death.<sup>2</sup> The second cause of action was for corporate negligence for failing to ensure competence of medical staff pursuant to *Elam v. College Park Hospital* (1982) 132 Cal.App.3d 332. Finally, Burton's wife brought a survival action for medical negligence.<sup>3</sup>

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<sup>2</sup> Drs. Ramirez and Romman were subsequently dismissed as defendants.

<sup>3</sup> "[A] survival action is a cause of action that existed while the decedent is alive and survives the decedent." (*Adams v. Superior Court* (2011) 196 Cal.App.4th 71, 78-79; see Code Civ. Proc., § 377.30.)

*Motion for Summary Judgment*

Sierra Vista Hospital and Psychiatric Solutions, Inc. moved for summary judgment or summary adjudication. In framing the issues of the case, defendants relied upon plaintiffs' answers to special interrogatories. The interrogatories asked for all facts that supported a claim of medical negligence. In their answers, plaintiffs identified three facts: (1) failure to provide a CPAP machine; (2) failure to obtain a medical evaluation of Burton when he had a change in condition; and (3) failure to monitor Burton resulting in his death.

In support of their motion, defendants provided the expert declaration of Charles Scott, M.D., a professor of psychiatry at the University of California, Davis. Scott opined that the care and treatment of Burton by the psychiatric nurses at Sierra Vista Hospital complied with the standard of care. He found the initial screening, the integrated nursing assessment, and the multidisciplinary plan that was formulated were appropriate and within the standard of care. Scott opined that at 4:25 a.m., Burton was exhibiting classic mild to moderate alcohol withdrawal symptoms and staff's care after that time was within the standard of care. Beginning at 6:48 a.m., medical records indicated a mental health technician was outside Burton's door for assistance if necessary while he used the urinal; he was not yet finished at 6:58 a.m. Staff's treatment and care of Burton when he was found nonresponsive a few minutes later was appropriate and within the standard of care.

Defendants also provided the declaration of Timothy Albertson, M.D., M.P.H., Ph.D., the Chief of the Division of Pulmonary and Critical Care Medicine and Acting Chair of the Department of Medicine at the University of California, Davis School of Medicine. Albertson stated that CPAP devices were categorized as therapeutic, not life-saving. It can take 30 minutes to three hours for carbon dioxide to build up to toxic levels with partial obstruction of the upper airway. Albertson opined that not using a CPAP machine during his stay at Sierra Vista Hospital was not a substantial factor in causing Burton's death. Burton had high oxygen levels and was never noted to be in respiratory distress. Further, he was awake and communicating five minutes before he was found nonresponsive.

#### *The Opposition*

Plaintiffs opposed the motion. They argued a continuance was necessary to conduct further discovery, namely the depositions of Sierra Vista Hospital staff. They also contended that defendants had failed to meet their burden on the issues of agency of Drs. Ramirez, Romman, and Nwangburuka.

Plaintiffs disputed several facts that defendants asserted were undisputed; their dispute was based on objections that the evidence in support of these facts, primarily medical records, lacked foundation. Plaintiffs did not offer any contrary evidence.

#### *Defendants' Reply*

In reply, defendants submitted two declarations by physicians. These declarations had been prepared for the

summary judgment motions by Ramirez and Romman, prior to their dismissal. Brian Steber, M.D. opined that Ramirez met the standard of care in his care and treatment of Burton. Ramirez did not give Burton the drugs that caused his death and the failure to provide a CPAP machine did not cause Burton's death. Bernard Rappaport, M.D. declared that Romman had not been paged until Burton felt better, at which point there was nothing to do. The standard of care did not require any action when Burton was resting comfortably.

The motion was continued for further discovery.

#### *Further Opposition*

Subsequently, plaintiffs filed a further opposition to the motion for summary judgment. They argued there was a breach of the standard of care relating to the CPAP machine and the failure to call a doctor when Burton was found on the floor.

In support of this opposition, plaintiffs submitted the declaration of Marvin Pietruszka, M.D. Pietruszka was an internist, pathologist, and medical director of Del Carmen Medical Center. In his opinion, it was a breach of the standard of care not to notify a doctor of Burton's need for a CPAP device. Pietruszka opined the standard of care requires a protocol for patients with sleep apnea and the use of a CPAP device. Further, he opined it was below the standard of care not to notify a doctor of Burton's change of condition, when he was found on the floor. In Pietruszka's opinion, these breaches of the standard of care were substantial factors in causing Burton's death.

Plaintiffs objected to the admission of Burton's medical records. Defendants objected to Pietruszka's declaration as lacking foundation and being an improper opinion.

*Trial Court's Ruling*

The trial court sustained defendants' evidentiary objections and overruled those of plaintiffs. The court granted the motion for summary judgment. Judgment was entered in favor of defendants.

**DISCUSSION**

I

*Standard of Review*

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant meets his burden of showing that a cause of action has no merit if he shows that one or more of the elements of the cause of action cannot be established, or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists. (*Ibid.*)

The rules for review of a trial court's grant of summary judgment are well-settled. We review the court's decision de novo, taking the facts from the record before the trial court, and "considering all the evidence set forth in the moving and opposing papers except that to which objections were made and



sustained.” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039 (*Hughes*), internal quotation marks omitted.) “In addition, we liberally construe the evidence in support of the party opposing summary judgment and resolve any doubts concerning the evidence in favor of that party.” (*Hughes, supra*, 46 Cal.4th at p. 1039.)

## II

### *Failure to Negate Allegations of Agency*

Plaintiffs contend the trial court erred in granting summary judgment because defendants failed to negate plaintiffs’ allegation that the doctors who treated Burton were acting as agents of the hospital and the doctors breached the standard of care.<sup>4</sup> In the first cause of action for medical negligence, plaintiffs allege each defendant was the agent of the others and each defendant failed to exercise due care. These allegations were incorporated in the third cause of action, the survival action for medical negligence. Plaintiffs contend defendants

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<sup>4</sup> In their reply to the opposition to summary judgment, defendants did provide expert declarations that Drs. Ramirez and Romman met the standard of care. As plaintiffs note, generally, the moving party may not rely on new evidence filed with its reply papers. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.) The record does not indicate, however, that plaintiffs objected to the trial court’s consideration of the late-filed evidence. Such a failure to object has been deemed a forfeiture that permits the court to consider such evidence. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1426.) In any event, like the trial court, we do not find it necessary to consider the late-filed evidence to sustain summary judgment.

failed to provide evidence that the doctors were not agents of the hospital or that the doctors were not negligent.

In a motion for summary judgment, the pleadings frame the issues. (*Heritage Marketing & Ins. Services, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754, 764.) Here, the complaint alleged negligence only in the most general terms. In moving for summary judgment, defendants narrowed the scope of the issues by relying on plaintiffs' answers to special interrogatories. (See *Jones v. County of Los Angeles* (1981) 114 Cal.App.3d 999, 1006 [discovery devices, such as interrogatories, designed to narrow issues].)

Defendants propounded special interrogatories to plaintiffs, asking them to "state all facts" which support their contention of medical negligence. Plaintiffs responded that the hospital "failed to provide Mr. Burton with a C-PAP machine despite knowledge that he required one, failed to properly obtain a medical evaluation of Mr. Burton when there was a change in his condition, and failed to properly monitor Mr. Burton resulting in his death."

Where a party's answers to interrogatories indicate they have no facts to support their claims, the party moving for summary judgment can rely on those factually devoid interrogatory answers to shift the burden. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 592-593.) Accordingly, defendants need only negate the factual theories of negligence set forth in plaintiffs' interrogatory answers, as

the burden has shifted on all other factual theories not identified.

Defendants provided evidence, expert declarations, to negate the factual theories identified in the interrogatory answers. Dr. Albertson opined the lack of a CPAP machine was not a substantial factor in Burton's death. Any failure to obtain a further medical evaluation or to monitor Burton properly is a failure by the nursing staff as it was staff's responsibility to summon a physician and monitor the patient. Dr. Scott opined that the nursing staff properly cared for and treated Burton while he was at the hospital. Plaintiffs offered no admissible evidence to raise a triable issue of fact as to these theories of negligence.

As the trial court found, the interrogatory responses did not address deficiencies by the physicians. Therefore, defendants were not required to negate allegations of agency to carry their burden on summary judgment.

### III

#### *Breach of Standard of Care*

Plaintiffs contend several triable issues of material fact remain as to whether the nursing staff breached the standard of care. Plaintiffs rely exclusively on Pietruszka's declaration, in which he opined the nursing staff breached the duty of care in two instances. First, they failed to notify a doctor that Burton was admitted without his CPAP machine, instead determining that he would be fine without it. Second, they failed to notify a doctor when Burton was found on the floor,

simply putting him back in bed. Pietruszka further opined that the standard of care required a protocol regarding admission of patients with sleep apnea and the use of CPAP machines.

Pietruszka offered the only evidence to counter the expert declarations submitted by defendants. Plaintiffs *ignore* that defendants objected to the admission of Pietruszka's declaration and the trial court *sustained* the objection. Plaintiffs do not challenge this evidentiary ruling on appeal. Accordingly, any issue concerning the correctness of the court's ruling has been forfeited and we consider such evidence to have been properly excluded.<sup>5</sup> (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015; also *Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1177-1178.)

In reviewing a ruling on a summary judgment motion, we consider "all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained. [Citations.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.) Without Pietruszka's declaration, there was *no* evidence to counter the expert opinions of Scott and Albertson that the nursing staff did not breach the standard of care. There was no evidence to create a triable issue of fact.

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<sup>5</sup> We are baffled by plaintiffs' reliance on a declaration that was explicitly excluded by the trial court when plaintiffs do not challenge the evidentiary ruling that excluded the declaration.

**DISPOSITION**

The judgment is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

\_\_\_\_\_, J.  
DUARTE

We concur:

\_\_\_\_\_, Acting P. J.  
HULL

\_\_\_\_\_, J.  
BUTZ